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**IN THE
COURT OF APPEALS OF INDIANA**

SABRINA L. MCCAMMON.

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 18A04-0701-CR-37

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Robert L. Barnett, Judge
Cause No. 18C03-0607-FB-15

October 25, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Sabrina L. McCammon appeals her convictions for Burglary,¹ as a class B felony, and Theft,² a class D felony, as well as her sentence. She presents the following restated issues for review:

1. Were two photographs improperly admitted into evidence over McCammon's relevancy objection?
2. Did the trial court improperly overrule McCammon's objection to a portion of the prosecutor's closing argument?
3. Did the trial court abuse its discretion in sentencing McCammon?

We affirm.

On July 4, 2006, the Downham family went into town for lunch around noon. When they left, all the doors to their house were closed and locked. They arrived home about an hour later and found a strange car in their driveway. The car, which was still running, appeared to have been backed into the driveway and there was a man in the passenger seat.

Debra Downham approached the man in the passenger seat of the car and asked if she could help him. He responded that there was a girl at the house talking to someone about getting help for her car.³ Knowing that nobody was in her home, Debra approached the front door. At the same time, McCammon came out of the door with an armload of things from the home, including an iPod, videotape, and several food items.

¹ Ind. Code Ann. § 35-43-2-1(1)(B)(i) (West 2004).

² I.C. § 35-43-4-2(a) (West 2004).

³ McCammon did not know this man and had picked him up on the road shortly before stopping at the Downhams' residence.

Debra's husband, Alan, approached as Debra confronted McCammon. McCammon responded that she was hungry and having car trouble and that she planned to pay for the items later. When asked why she had items other than food if she was just hungry, McCammon did not have an answer. Debra proceeded to call 911.

McCammon put the items down and then jumped over the porch railing. She ran to her car but could not drive away because Alan had blocked her in the driveway with his jeep and then his wrecker. McCammon then exited her car and ran into the woods. The Downhams' teenaged daughter, however, was able to grab McCammon and hold onto her until the police arrived shortly thereafter. During a search of McCammon's person, police found more items from the Downhams' home, including an envelope addressed to the Downhams and a bank payment book containing their names, address, and bank account number. Police also found a grocery receipt in her back pocket. The investigation revealed that McCammon had entered the home through a locked basement door, which sustained damage during the entry. It also became evident that McCammon had rifled through drawers and cabinets throughout the house looking for items to take.

On July 7, 2006, the State charged McCammon with class B felony burglary and class D felony theft. At the jury trial, the court admitted into evidence two pictures of the interior of McCammon's vehicle over her relevancy objection. Further, during closing argument, the prosecutor referenced the fact that McCammon had alcohol on ice in her car. The prosecutor further indicated that regardless of whether she was drunk or high, it would not constitute a defense to her crimes. McCammon objected on grounds that no

evidence was submitted concerning her sobriety, but the trial court overruled the objection. The jury ultimately found McCammon guilty as charged.

At the sentencing hearing, the trial court found four mitigating factors: 1) McCammon had no prior felony convictions; 2) she has family support; 3) she has been employed in the past and has attempted to meet her family responsibilities; and 4) the crimes were the result of circumstances unlikely to recur. The court found as aggravating circumstances that McCammon had two prior misdemeanor convictions and had violated the conditions of her release on bond in this case. The court found that the mitigating factors outweighed the aggravating factors and imposed an executed sentence of six years on the burglary conviction and a concurrent one-year sentence on the theft conviction. McCammon now appeals her convictions and sentence. Additional facts will be provided below as necessary.

1.

McCammon initially challenges the admission of two photographs depicting the interior of her car. The photographs, particularly one of them, showed several alcoholic beverages on ice behind the driver's seat. McCammon generally objected to the admission of these exhibits at trial "on the basis of relevancy." *Transcript* at 90. On appeal, she claims the pictures of alcohol were irrelevant to the crimes charged because there had been no evidence submitted that she had been drinking and she had not introduced intoxication as a defense.

The decision to admit or exclude evidence lies within the trial court's sound discretion and is afforded great deference on appeal. *Willingham v. State*, 794 N.E.2d

1110 (Ind. Ct. App. 2003). We will not overturn a trial court's evidentiary ruling absent a showing of a manifest abuse of discretion resulting in the denial of a fair trial. *Id.* Moreover, even if the trial court abused its discretion by admitting the challenged evidence, we will reverse only if "the error is inconsistent with substantial justice" or if "a substantial right of the party is affected." *Timberlake v. State*, 690 N.E.2d 243, 255 (Ind. 1997). Further, any error caused by the admission of evidence is harmless error for which we will not reverse a conviction if the erroneously admitted evidence was cumulative of other evidence appropriately admitted at trial. *See Kubsch v. State*, 866 N.E.2d 726 (Ind. 2007).

Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Ind. Evidence Rule 401. The standard of admissibility under Rule 401 is a liberal one. *Jackson v. State*, 712 N.E.2d 986 (Ind. 1999).

The State contends that evidence McCammon had numerous bottles of alcohol iced down in her car is relevant because it casts doubt on the credibility of her claim, which she made to the Downhams and in her recorded statement to police, that she was only taking food from the house because she was poor and starving. In light of the rather low threshold for relevance under Rule 401, we tend to agree with the State.

Further, even if the evidence was not relevant, McCammon has failed to establish how she was harmed. Before the photographs were admitted, Officer David Hanauer testified that right behind the driver's seat of McCammon's vehicle there appeared to be bottles of beer, soft drinks, and a bottle of Crown Royal on ice. McCammon did not

object to this testimony. Moreover, in her own statement to police, which was admitted at trial and played for the jury, McCammon indicated that she had alcohol in her vehicle. Therefore, the photographs depicting alcohol in her vehicle were merely cumulative of other evidence admitted at trial. *See Edwards v. State*, 730 N.E.2d 1286 (Ind. Ct. App. 2000) (error in the admission of evidence is harmless if the same or similar evidence has been admitted without objection).

2.

McCammon next argues that the prosecutor made improper remarks during closing argument about her sobriety. She claims there was no evidence regarding her sobriety admitted at trial and, therefore, the trial court should have sustained her objection.

At the beginning of the prosecutor's closing argument, after leading in with the fact McCammon had been "caught red-handed", the prosecutor stated: "Was she drunk? I don't know. She had several bottles of beer on ice in the back of her, behind her seat, a bottle of Crown Royal. Was she high?" *Transcript* at 107-08. Defense counsel interposed an objection at that point, arguing there had been no evidence in the case regarding McCammon's state of sobriety. When the objection was overruled, the prosecutor continued in relevant part:

Was she high? I don't know. Is she bipolar? We don't know that either, do we. It doesn't matter though because none of it is a defense. You won't get a single instruction about any of those things rising to a level of a defense.... Did she need help with her car? Was she hungry? Was she homeless? I don't know. Once again, it doesn't matter, does it? Not a single one of those things rises to the level of a defense. The Judge is going

to give you final instructions. None of that will be mentioned as a defense....

Id. at 108.

To preserve an issue regarding the propriety of a closing argument for appeal, a defendant must do more than simply make a prompt objection to the statement. *Gasper v. State*, 833 N.E.2d 1036 (Ind. Ct. App. 2005), *trans. denied*. “The defendant must also request an admonishment, and if further relief is desired, defendant must move for a mistrial. Failure to request an admonishment results in a waiver of the issue for appellate review.” *Flowers v. State*, 738 N.E.2d 1051, 1058 (Ind. 2000). The record here clearly shows that although McCammon objected to the prosecutor’s comment during closing argument, she failed to request an admonition. Therefore, she has waived the issue for appellate review.

Waiver notwithstanding, we conclude that the prosecutor’s remarks were not improper. “While a prosecutor may argue both law and facts and propound conclusions based on his or her analysis of the evidence, the prosecutor must confine closing argument to comments based only upon the evidence presented in the record.” *Gasper v. State*, 833 N.E.2d at 1042-43. Here, the jury could reasonably infer from McCammon’s bizarre behavior during the taped interview with police that she was under the influence of some type of substance. Further, during her statement, she put forth a number of apparent excuses for her behavior at the Downhams’ home. It was perfectly appropriate for the prosecutor to argue that even if McCammon was hungry, homeless, intoxicated, high, bipolar, or having car troubles, such did not constitute a defense to the criminal

charges brought against her. Finally, even assuming for the sake of argument that the prosecutor's comments were improper, McCammon has once again failed to establish how she was prejudiced thereby. *See Gasper v. State*, 833 N.E.2d at 1042 (in addition to establishing misconduct occurred, a claim of prosecutorial misconduct requires a showing that the misconduct "placed the defendant in a position of grave peril to which the defendant should not have been subjected").

3.

McCammon also challenges her aggregate sentence of six years in prison. She claims the trial court abused its discretion by failing to recognize the fact that she has mental health problems. While McCammon received the minimum sentence for her class B conviction,⁴ she appears to argue that some or all of that sentence should have been suspended based upon her mental health.

"An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." *See Anglemeyer v. State*, 868 N.E.2d 482, 493 (Ind. 2007). With respect to mental illness, our Supreme Court has specifically stated:

The American Psychiatric Association's definitions of mental illness, contained in the Diagnostic and Statistical Manual of Mental Disorders (presently "DSM-IV-TR") have continued to expand to the point that a recent study declared that about half of Americans become mentally ill and half do not. This suggests the need for a high level of discernment when assessing a claim that mental illness warrants mitigating weight. In *Weeks*

⁴ Ind. Code Ann. § 35-50-2-5 (West, PREMISE through 2007 Public Laws approved and effective through April 8, 2007) provides in relevant part: "A person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years."

v. State, we laid out several factors to consider in weighing the mitigating force of a mental health issue. Those factors include the extent of the inability to control behavior, the overall limit on function, the duration of the illness, and the nexus between the illness and the crime.

Covington v. State, 842 N.E.2d 345, 349 (Ind. 2006) (footnote and citation omitted).

On appeal, McCammon claims generally that she has “mental problems”. *Appellant’s Brief* at 12. She has not addressed any of the factors set forth by our Supreme Court. Moreover, our own review of the sentencing record reveals no evidence of long-term mental illness. Indeed, McCammon’s father testified that he was unaware of any history of mental illness and that he did not start seeing dramatic changes in his daughter until shortly before her arrest. *See Transcript* at 138 (“after July the 4th, it was just like two (2) different women”). After her arrest and while out on bond in the instant case, McCammon was allegedly hospitalized in a psychiatric ward and diagnosed with bipolar disorder. After her hospitalization, McCammon apparently sought counseling to “stop smoking marijuana, stop drinking, and get [her] life back on track”. *Id.* at 140. McCammon also testified that she received some undisclosed form of mental health treatment in January 2006, though there is no other evidence in the record to support this claim. None of this constitutes evidence of a longstanding mental illness.

Additionally, there is no evidence in the sentencing record indicating that McCammon’s mental health affected her ability to control her behavior or limited her ability to function. In fact, the pre-sentence investigation report indicates that McCammon described her mental health as “Fair.” *Appellant’s Appendix* at 101. Even more importantly, we observe that McCammon has not attempted to establish a nexus

between her alleged mental illness and the crimes she committed. *See Evans v. State*, 855 N.E.2d 378, 387-88 (Ind. Ct. App. 2006) (“a defendant’s mental illness is afforded mitigating weight in circumstances that establish a nexus between the mental illness and the offense”), *trans. denied*; *Corralez v. State*, 815 N.E.2d 1023, 1026 (Ind. Ct. App. 2004) (“in order for a mental history to provide a basis for establishing a mitigating factor, there must be a nexus between the defendant’s mental health and the crime in question”).

We reiterate that McCammon was required to establish the mitigating evidence is significant and clearly supported by the record. *See Anglemeyer v. State*, 868 N.E.2d 482. She has not met her burden here. Therefore, we conclude that the trial court did not abuse its discretion in failing to find McCammon’s mental health to be a mitigating circumstance. *See Henderson v. State*, 769 N.E.2d 172 (Ind. 2002) (trial court does not err in failing to find mitigation when defendant’s claim is highly disputable in nature, weight, or significance).

Judgment affirmed.

SHARPNACK, J., and RILEY, J., concur.